IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No. 1015-SB of 1998
Date of decision : 13.03.2012

Dharam Pal .....Appellant

VERSUS

State of Punjab etc. ....Respondents

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Ms. Baljit Mann, Advocate
for the appellant.

Mr. Sumeet Goel, Advocate
for respondent No. 2.

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RANJIT SINGH, J.

The Senior Cashier working in the office of Senior Accounts officer, Mechanical Workshop, Northern Railways, Amritsar is in appeal before this Court to challenge his conviction under Section 409 IPC and Section 13 (1)(c) read with Section 13 (2) of Prevention of Corruption Act (hereinafter referred to as an 'Act') resultant and sentence of 2 ½ years rigorous imprisonment for offence under Section 409 IPC and rigorous imprisonment for 2 years for offence under Section 13 of the Act. In addition, the appellant was also sentenced to pay fine of Rs. 2000/- and Rs. 1000/- respectively for these two respective offences for which he was convicted. Both the sentences were made to run concurrently

and in default of payment of fine Rs. 2000/-, the appellant was sentenced to undergone six months rigorous imprisonment and for 3 months in case of default of payment of fine of Rs. 1000/- imposed for conviction under the Prevention and Corruption Act.

The embezzlement as alleged against the appellant surfaced when CBI team headed by Sh. S.S. Gurm, Inspector CBI, Chandigarh carried out surprise check of the cash of office where the appellant was working as Senior Cashier. This surprise raid was conducted on 11.08.1995. While the checking was on, the appellant managed to leave the cash office on the pretext of attending the office of Senior Accounts Officer for attending some official work. The appellant left behind the keys of strong room and so also the cash book. Thereafter, the appellant did not return for quite some time. The Inspector heading the team, accordingly, sealed the strong room and handed over the keys to Sh. Ram Kamal, Senior Accounts Officer working in the Mechanical workshop at Amritsar for safe custody. During this raid, the raiding party also took into possession sale suspense issue note voucher No. 1580 dated 10.03.1995 and the sale suspense issue note voucher No. 1544 dated 28.02.1995. One file containing pages marked 1 to 6 related to the surprise check, conducted by the Railway Divisional Cashier was also taken in custody. A surprise check memo was prepared, which was attested by the members of the CBI checking party and also Sh. Ram Kamal, Senior Accounts Officer. Sh. S.S. Gurm, Inspector, CBI. Alongwith other officers, the Inspector again came to the workshop on 19.09.1995 to complete the checking, which had been left after

sealing. In the presence of Sh. B.B. Chopra, Sh. J.K. Kakkar, and two bank officials and also the accused, the Inspector broke open the seal of strong room. Seal opening memo, Ex. PW3/1 was prepared, which was attested by the witnesses and duly signed by the appellant. The cash in strong room was counted and found to Rs. 15,27,627/-. When tallied with the cash book, which was maintained by Dharampal-appellant, the cash in hand should have been Rs. 33,34,720/- The appellant was granted permission to complete the entries in the cash book. He, accordingly, made some entries accounting for Rs. 12,27,054/- due from other cashiers under him. This brought the amount in hand to Rs. 27,55,681/- as against Rs. 33,34,720/-. On this basis, shortage of Rs. 5,79,039/- was arrived at. The appellant recorded a note produced in the evidence as Ex.PW2/2 in his own handwriting admitting the shortage of amount as noticed. The surprise check memo was also prepared and is on record as Ex. PW3/2. This had also been signed by the appellant. On the basis of surprise check memo, regular case was registered by the Superintendent of Police, CBI, Chandigarh and so FIR/RC No. 31/95 dated 19.09.1995 registered against the appellant under Section 409 IPC and Section 13 of the Act.

During the course of investigation, the appellant also made a disclosure statement, which is exhibited on record as Ex. PW3/3. As per the disclosure statement an amount of Rs. 5,75,000/- had been kept by the appellant at his residence in Railway Colony, Amritsar. The appellant stated that the said amount can be got recovered by him. The disclosure statement was signed by the

appellant and attested by witnesses. The appellant took the CBI party to his house and in the presence of Sh. B.B. Chopra, Sh. J.K. Kakkar, Sh. S.R. Shukla, Sh. P.N. Sharma and Sh. K.K. Kalia. An amount of Rs. 5,75,000/- lying in one suitcase in the bedroom of the appellant was recovered. This amount was taken in possession vide Ex. PW3/4. This was again signed by the appellant and the witnesses named above. On the basis of investigation so conducted, the CBI accused the appellant of offences under Section 409 IPC and Section 13 of the Act. After obtaining the sanction from the competent authority, the charge sheet was submitted in the Court.

In support of its case, the prosecution examined as many as eight witnesses. The documentary evidence reference to which has already been made to an extent, was also produced before the trial Court, which included surprise check memo, seal opening memo and the surprise check report. The incriminating evidence and the circumstances appearing in evidence was put to the appellant during his examination under Section 313 Cr.P.C.

In his statement, the appellant has admitted that he was working as Senior Cashier in the Mechanical Workshop, Northern Railways, Amritsar. The appellant also conceded that the keys of the strong room were with him. It is on record that another surprise check was conducted on 08.08.1995 by Chief Cashier and shortage of Rs. 27/- was found in his account, which he had made good. The appellant, however, denied if any shortage has been found by the CBI party. The appellant would contend that the cash book was maintained by him on 19.09.1995 at the instance of the Investigating

Officer. The appellant denied if he had made disclosure statement of amount of Rs. 5,75,000/- recovered from his house. His plea is that the Investigating Officer obtained his signatures on some blank papers, which he later on converted into various memos. The appellant would plead that no suit case was recovered from his bedroom. According to the appellant, the Investigating Officer was having a brief case with him, in which he put the cash from the Railway office and had shown it recovered from the same brief case which was not produced in the Court. The appellant has also raised objection on the competency of Mrs. S.D. Das to accord sanction for his prosecution.

The appellant has also examined two witnesses in his defence. It is on this basis urged that Inspector Sh. S.S. Gurm had gone to Delhi on 16.09.1995 and returned on 18.09.1995 and went to Amritsar on 19.09.1995. Rakesh Kumar was examined as DW2, who was the Taxi driver. He had allegedly taken Sh. S.S. Gurm from Amritsar to Chandigarh but he statedly did not perform such duties. As per this witness, he was taken to Railway workshop at Amritsar and have denied to see the appellant. Even he was not aware about the charges paid by the CBI.

The Special Judge, on the basis of evidence as led and on appreciation thereof, has found that the charges preferred against the appellant are proved and, accordingly, had sentenced him as already noticed.

Counsel appearing for the appellant has mainly urged that there are gapping holes in the story as projected by the CBI. Counsel

would contend that it will not be possible to believe that the CBI during surprise check would have allowed the appellant to leave the place and, accordingly, would urge that the things of strong room safe have been sealed and keys and cash book being handed over to other witnesses is highly doubtful. Counsel would then contend that nothing was done for a period of nearly 1½ months till the CBI team returned on 19.09.1995. It is alleged that the appellant was forced to make entries in the cash book. Otherwise, there was no shortage. Counsel would contend that the conviction has been returned primarily on the basis of these entries, which were not voluntarily made but forcibly obtained from the appellant. It would be even in violation of compulsive testimony and thus, would be hit by Article 20 (3) of the Constitution of India. In short, the counsel would plead that the appellant was compelled to be witness against himself. As per the counsel, the confession/admission, as has been made in the disclosure statement would be hit by Sections 25 and 26 of the Indian Evidence Act. The portion, where some confession and statement of confessional nature has been recorded in the disclosure memo, would be a statement/confession made before the police officer and, hence, not admissible in evidence. This piece of evidence, hence, could not proved and allowed against the appellant. On this basis, counsel would plead that prosecution has failed to prove the charges against the appellant and he would deserve the finding of acquittal.

Counsel appearing for respondent/CBI, however, would contend that it is case of shortage where huge amount was

recovered from the house of the appellant and there is no explanation forthcoming except to say that this case was falsely foisted on the appellant. Counsel for the CBI would refer to the presence of independent witnesses, which were from the bank to show that the allegation as being made by the appellant of false recovery would be rather farfetched. The submission that the conviction was only on the basis of entries, which were forcibly got made from the appellant is stated to be a stand of convenience. As per the counsel, the prosecution had led sufficient evidence to establish the guilt of the appellant for both the offences and hence no case for interference in the finding as returned by the Special Judge is made out.

It is not in dispute that the appellant was working as Senior Cashier. It is also not disputed by the appellant that he was required to maintain cash book and also he was under obligation to account for the amount being entrusted to him on behalf of the Government. It is also not disputed that the appellant was in charge of strong room and the keys used to remain with him and in his sole possession. The appellant also conceded that he was required to make entries in the cash book. It is on the basis of entries made in the cash book that the discrepancies and the shortages in cash have been so noticed. On the basis of these entries in the cash book that it can be observed that net cash on charge as on 11.08.1995 was Rs. 15,27,627/-. A sum of Rs. 98,89,663/- was due from Sh. D.P. Yadav. Similarly amount of Rs. 86,199/-, Rs.11,12,371, Rs. 33,172/- and

Rs. 6,649/- was due from Madan Lal, C.D. Dev Rani, Manwinder Singh and O.P. Verma respectively. On this basis, sum of Rs. 27,55,681/- was found to be with the appellant as cash in hand. As per the calculation, the appellant was required to account for sum of Rs. 33,34,720/- and on this basis, it is alleged that there was shortage of Rs. 5,79,039/-. The trial Court has made reference to Ex. PW2/2, which is in the hand writing of the appellant. This is to the effect that sum of 5,79,039/- was recovered from the appellant. This statement have been made before police officer and obviously cannot be taken into account being admission of the facts stated therein. It would have been appropriate for the trial Court not to take this aspect into consideration. Even after ignoring the same, the evidence which has come on record would show that these figures have been arrived at on the basis of entries made in the cash book. The cash book was exhibited on record and is available as Ex. PW2/1. The appellant has not disputed that the entries made in the cash book, are in his hand writing. The submission is that these disputed entries have been got made from him by the Investigating Officer. Even if this argument, though farfetched one, is accepted still nothing prohibited the appellant from showing and proving the actual entries, which he would have made to account for the shortage. The appellant could then have urged that there was no shortage. Even if this plea is accepted, it was for the defence to establish and account for the shortage which has been alleged against the appellant by the prosecution. It was very easy for the

defence to account for this money, if the shortage has been arrived at on the basis of forged entry. What appears to have happened is that the appellant was required to reconcile the accounts he being the Senior Cashier and required to account for cash in hand. He did make an effort to account for the money and could reconcile the amount to the tune of Rs.27,55,681/-. As per the evidence and the entries in the cash book, the appellant was required to be in possession of cash to the tune of Rs. 33,34,720/-. It is on this basis that the shortage was alleged. A sum of Rs. 5,75,000/- was the amount, which was recovered from the house of the appellant.

The bald assertion of the appellant that there was no recovery effected and the amount was put in brief case by the Investigating Officer would be a defence, which is a defence of convenience. The defence has not advanced any reason for which the Investigating Officer would falsely implicate the appellant. This recovery has been effected and is witnessed by four independent witnesses namely Sh. J.K. Kakkar, Senior Manager, Regional Officer, Punjab National Bank, Amritsar, Sh. B.B. Chopra, Manager, Punjab National Bank, Amritsar, PW4, Sh. A.K. Chanda, CBI Inspector, PW5, Sh. P.N. Sharma, Senior Accounts Officer, Railway Workshop, Amritsar, and Manvinder Singh, Office Superintendent of Chief Cashier, Office of Northern Railway, New Delhi, PW7 besides the Investigating Officer, Sh. S.S. Gurm, who was examined as PW8. It would rather an exaggeration to urge that all these witnesses were made to sign to show this recovery but infact no recovery was

effected in their presence. There is no explanation forthcoming against any of these persons, few of whom, are totally independent. Accordingly, this defence that this recovery was foisted falsely upon the appellant is defence of convenience and cannot be accepted.

I am not not ready to accept that the appellant was forced to make the entries in the cash book. It was for the appellant to prove by leading cogent evidence during the course of trial to say that he was made to self-incriminate himself.

This plea of the appellant may have to be examined in the background of newly introduced Section 311-A of Cr.P.C., which now empowers the Magistrate Ist Class to direct any person, including the accused to give specimen signature or handwriting for the purpose of any investigation or proceedings under this Code. Though it is not a case, where the court had issued direction to the appellant-accused to give any signature or handwriting for the purpose of comparison but the plea of self-incrimination on the ground that he was made to make entries in the cash book would have to be considered in the light of the wide ranging directions which could be so issued in case there was any reluctance or refusal on the part of the appellant to make these entries. In fact, this Section has been introduced in view of the observations made by the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh Vs. Ram Babu Mishra***, AIR 1980 Supreme Court 791. It was observed that direction by the Magistrate to an accused to give his specimen handwriting when the case is still under investigation would surely be in the interest of administration of

justice but the language of Section 73 of the Evidence Act did not enable the Magistrate to give such direction, when the case is still under investigation. As per the Hon'ble Supreme Court, Section 73 of the Evidence Act, contemplated pendency of some proceedings before a Court and it did not permit a Court to give direction to the accused to give specimen handwriting for anticipated necessity for comparison in a proceeding, which may later be instituted in a Court.

Even long ago, in ***State of Bombay Vs. Kathi Kalu Oghad,*** AIR 1961 Supreme Court 1808, it was held that direction to give specimen signatures and handwriting for the purpose of comparison did not lead to any testimonial compulsion under Article 20(3) of the Constitution. The Hon'ble Supreme Court had accordingly suggested that a suitable legislation may be made on the analogy of Section 5 of the Identification of Prisoners Act to provide for investigating Magistrate with power to issue direction to investigate any person including an accused person to give specimen signature and handwriting. In this background, the entries made voluntarily by the appellant in the cash book without any protest can not be termed as compulsive testimony or something which would lead to self incrimination. It has been noticed by the trial Court that there was not even suggestion put in this regard to any of the witnesses who appeared in support of the recovery and to prove the entries made in the cash book. There is not much dispute raised by the defence in regard to sealing of the cash and the documents on 11.08.1995. These were done in the presence of independent witnesses, who belonged to the workshop. The keys were not kept by

the Investigating Officer but was handed over to Ram Kamal, Account Officer. Subsequently when CBI team came for checking, the keys were taken from the same witness and then the seals were reopened in the presence of witnesses.

The submission that no action was taken on 11.08.1995 and that there was no reason for the CBI to wait for over a month again would not impress me in any manner. This was the case, where no action could have possible been initiated till the shortages were found and noticed. The shortages surfaced only when the appellant was given opportunity to reconcile the entries in the cash book. If on re-conciliation, the cash in had had tallied with the cash received by the appellant for which he was required to account for, perhaps no offence would have been made out against the appellant. It is only when the shortage was noticed and thereafter the appellant had made disclosure statement leading to recovery of amount lying at his house that the embezzlement surfaced. Thereafter, the FIR was lodged against the appellant.

It is a settled principle of law that in case of embezzlement and misappropriation, the prosecution is only required to prove that the accused person is required to account for particular amount, it having been come in possession on being entrusted to him. It is, thereafter, for the appellant or the accused person to account for to show where the money has been appropriated in any manner. Where the accused person is unable to account for the amount, which has come to be entrusted to him then the prosecution can seek his conviction by requiring the Court to draw the inference

that the amount has been misappropriated. No sincere efforts were made to account for this amount. Rather the amount corresponding to the shortages found was recovered from the house of the appellant.

I have already held that the allegation that his recovery was falsely foisted cannot be accepted. I am not inclined to accept the plea of defence in view of overwhelming evidence led by the prosecution. The conviction and the finding returned by the Court, therefore, does not call for any interference. The appeal lacks merit and, therefore, deserves to be dismissed.

At this stage, counsel for the appellant has pleaded for leniency. Counsel would contend that the incident is of 1995 vintage. The appellant has already been dismissed from service. The shortages, which were found, were ultimately recovered as the cash was recovered from the house of the appellant even as per the prosecution story. Thus, the loss is also negligible. The appellant is indulging these proceeding and the outcome therefrom from the last more than 17 years. By now, the appellant is 58 years old.

Considering all these aspects, case for showing some leniency to the appellant is made out. The sentence as imposed, therefore, is reduced to the period of one year for an offence under Section 409 IPC and identical sentence for one year for his conviction for offence under Section 13(1)(c) of the Act. Both the sentences, however, shall run concurrently. The fine as imposed shall stand enhanced to Rs. 20,000/- and Rs. 10,000/- for offences under Sections 409 of IPC and 13 of the Act respectively. In default of

payment of fine, the sentence as imposed on the appellant by the Court shall stand revived.

The appeal is, accordingly ,dismissed.

March 13, 2012 (RANJIT SINGH)
rts JUDGE